Supreme Court, U. S.
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MAY 28 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1517

FEDERATED DEPARTMENT STORES, INC., and SAKS & COMPANY,

Petitioners,

v.

MARILYN MOITIE and FLOYD R. BROWN, individually, and on behalf of others similarly situated,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' SUPPLEMENTAL MEMORANDUM

EUGENE H. GORDON
JOHN C. GROSZ
BERNARD PERSKY
SOLINGER & GORDON
250 Park Avenue
New York, New York 10017

JAMES T. FOUSEKIS
JOHN CURRAN LADD
JEFFREY R. WILLIAMS
STEINHART, FALCONER & MORGANSTEIN
One Post Street
San Francisco, California 94104

Attorneys for Saks & Company

ABE KRASH
BRUCE L. MONTGOMERY
JEROME I. CHAPMAN
MARK L. PELESH
ARNOLD & PORTER
1229 19th Street, N.W.
Washington, D.C. 20036

PAUL FITTING
CHARLES G. MILLER
McKENNA & FITTING
220 Bush Street
San Francisco, California 94104

Attorneys for Federated Department Stores, Inc.

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PETITIONERS' SUPPLEMENTAL MEMORANDUM

Petitioners respectfully submit this memorandum,[1] supplementing their Petition for a Writ of Certiorari filed in this Court on March 28, 1980, to advise the Court of significant new developments since that date which further demonstrate that the decision of the United States Court of Appeals for the Ninth Circuit is erroneous and contrary to prior decisions of this Court and that certiorari should be granted.

Petitioners have asked this Court to review the Ninth Circuit's decision of November 15, 1979, in which

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[1] This supplemental memorandum is submitted in accordance with Supreme Court Rule 24(5).

the Court of Appeals—adopting a radically different view of the doctrine of *res judicata* from that set forth by this Court and the other Courts of Appeals—reversed the district court's dismissal of two actions on grounds of *res judicata*. These actions, which were filed by the same attorney and consolidated for purposes of appeal, are referred to in the Petition for a Writ of Certiorari as *Moitie II* and *Brown II*.[2] On May 7, 1980, after the Petition was filed, counsel for the plaintiffs in these cases moved for the voluntary dismissal of *Moitie II* under Rules 23(e) and 41(a)(1) of the Federal Rules of Civil Procedure. On May 12, 1980 the Honorable Spencer Williams, United States District Judge for the Northern District of California, entered an order dismissing *Moitie II*.[3]

The dismissal of *Moitie II* has two significant effects on the Petition now pending in this Court. First, it renders moot that portion of the Petition pertaining to *Moitie II*. Second, and most important, it underscores the error in the Ninth Circuit's stated justification for reversal of *Brown II*.

In *Brown II*, as in *Moitie II*, the Ninth Circuit ruled that non-appealing plaintiffs, whose complaints were dismissed by the district court for failure to state a proper claim, could avoid the *res judicata* effects of their dismissals merely because the plaintiffs in five

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[2] These cases are captioned as follows: *Moitie* v. *Federated Department Stores, Inc., et al.*, No. C-77-0576 SW (N.D. Cal., filed February 18, 1977, and removed to federal court Mar. 21, 1977); *Brown* v. *Federated Department Stores, Inc., et al.*, No. C-77-0577 SW (N.D. Cal., filed February 17, 1977, and removed to federal court Mar. 21, 1977).

[3] The motion and order are set forth in Appendix A.

other actions (referred to in the Petition as the *Weinberg* cases), also dismissed by the district court, did appeal and obtain reversals of their own dismissals. The non-appealing plaintiffs in *Brown I* and *Moitie I* had deliberately chosen, as a tactical measure, to refile their cases in state court, rather than appeal their dismissals to the Ninth Circuit. When these refiled suits (*i.e., Brown II* and *Moitie II*) were removed to federal court, they were dismissed on grounds of *res judicata.*

From these dismissals the plaintiffs did appeal. The Court of Appeals for the Ninth Circuit conceded that "A strict application of the doctrine of *res judicata* would preclude our review of the instant case." Petition, Appendix B, p. 9a. Nevertheless, it reversed. The Court of Appeals expressly based its reversal of *Brown II,* as well as *Moitie II,* on the premise that these cases were "closely interwoven" with the five *Weinberg* cases, ruling "that non-appealing parties may benefit from a reversal when their position is *closely interwoven with that of appealing parties.*" Petition, Appendix B, p. 10a (emphasis supplied).

The dismissal of *Moitie II,* by leaving *Brown II* as the only case to which the Petition is now addressed, undercuts the premise on which the Ninth Circuit's decision is based because it is clear beyond question that the allegations of *Brown II* are not "interwoven" —closely or otherwise—with those of the *Weinberg* cases, or even those of *Moitie II.* Unlike the *Weinberg* cases and *Moitie II,* which allege a price-fixing conspiracy in Northern California and seek to represent a class of persons residing in Northern California, *Brown II* alleges an entirely different conspiracy in

Southern California. Indeed, the conspiracy alleged in *Brown II* involves different markets, different stores, different personnel and a different class of plaintiffs—*i.e.*, residents of various *Southern* California counties —from those alleged in the *Weinberg* and *Moitie II* cases.

Since, in these circumstances, it cannot reasonably be said that the allegations of *Brown II* are "closely interwoven" with those of the *Weinberg* cases, the justification stated by the Ninth Circuit for its reversal of *Brown II*, to the extent it assumes that the facts of these cases are interwoven, simply does not exist.

As shown in the Petition, even if the Court of Appeals' premise were valid, its decision both with respect to *Brown II* and *Moitie II* was contrary to, and represented a radical departure from, the principles established by this Court in *Reed* v. *Allen*, 286 U.S. 191 (1932), and *Ackermann* v. *United States*, 340 U.S. 193 (1950), as well as an unbroken line of decisions by at least seven other Courts of Appeals. Now that the error in the Ninth Circuit's stated justification for its decision has been even more clearly revealed, we submit that it is even more appropriate for certiorari to be granted.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition for a Writ of Certiorari, filed with the Court on March 28, 1980, said Petition should be granted.

Respectfully submitted,

EUGENE H. GORDON
JOHN C. GROSZ
BERNARD PERSKY
SOLINGER & GORDON
250 Park Avenue
New York, New York 10017

JAMES T. FOUSEKIS
JOHN CURRAN LADD
JEFFREY R. WILLIAMS
STEINHART, FALCONER
& MORGANSTEIN
One Post Street
San Francisco, California 94104

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BRUCE L. MONTGOMERY
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1229 19th Street, N.W.
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MAY 28, 1980

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-77-0576 SW

MARILYN MOITIE, individually, and not on behalf of others similarly situated,

Plaintiff,

vs.

FEDERATED DEPARTMENT STORES, doing business as I. MAGNIN & Co. and BULLOCK'S; SAKS & Co. doing business as SAKS FIFTH AVENUE; and DOES I through XX,

Defendants.

NOTICE OF DISMISSAL; REASON THEREFOR, and (PROPOSED) ORDER

To: Attorneys for Defendants in this action:

PLEASE TAKE NOTICE that this action is hereby dismissed, without prejudice to either the dismissing representative Plaintiff nor to the asserted class.

This dismissal is pursuant to Federal Rules of Civil Procedure 41(a)(1) and 23(e), 28 U.S.C.

The requisites of rule 41(a)(1) are met in that no answer or counterclaim has been filed as to the instantly dismissed complaint.

The requisites of rule 23(e) are met by the following:

(a) agreement to this procedure by the Court at the Pretrial Conference on April 15, 1980;

(b) agreement between the parties' attorneys that any salient rights Ms. Moitie may have will be recognized in the related WEST COAST DEPARTMENT STORE ANTITRUST LITIGATION, C-79-2724 SW, now pending before this Court;

(c) recognition by the parties' attorneys that Plaintiff's counsel will seek compensation for fees and/or costs of suit at the appropriate time, and

(d) no class notice is required since no classwide rights are affected by this dismissal, and because Ms. Moitie's rights are to be preserved pursuant to subparagraph (b), *supra*, and because this dismissal is filed to avoid duplication of effort and expense in the WEST COAST DEPARTMENT STORE ANTITRUST LITIGATION.

Dated: May 7, 1980 at San Francisco, California.

Respectfully submitted,

LAW OFFICES OF JERROLD N. OFFSTEIN
JERROLD N. OFFSTEIN
MICHAEL WEISBERG

/s/ By JERROLD N. OFFSTEIN

FOR GOOD CAUSE APPEARING, IT IS SO ORDERED.

Dated: May 12, 1980

/s/ SPENCER WILLIAMS
UNITED STATES DISTRICT JUDGE